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RECENT LEGAL LITERATURE

COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA. By Thomas Raeburn White. Philadelphia: T. and J. W. Johnson Co., 1907, pp. xvii, 618.

Many treatises have been published on the Constitutional Law of the United States, and there are a few standard works on some branches of the constitutional law of the states in general, such as Cooley's *Constitutional Limitations* and Freund's *Police Power*. But there has been hitherto no serious attempt at a systematic presentation of the constitutional law of the several states in particular. This work is such a systematic discussion of the constitution of the important state of Pennsylvania as interpreted by the courts.

A book of this kind seems to serve a very useful purpose both to the law student and to the practicing lawyer in the state directly concerned. It does not, of course, replace the more general works, with their comparisons of judicial doctrines in different states. But it furnishes in more compact form the whole body of constitutional law as determined for this single state. And this is, of course, not only to the lawyers in that state, but also to the student of political science.

Mr. White's work follows the general order laid down in the Constitution of Pennsylvania. But some of the more important articles in the constitution are discussed in more than one chapter; and altogether there are twenty-eight chapters covering the eighteen articles. After a preliminary chapter on the construction of the constitution, there are eight chapters dealing with the various clauses of the declaration of rights; six chapters deal with the constitutional provisions on the legislature; and after a chapter each on the executive and judiciary, there are eleven chapters on the miscellaneous articles of the constitution on such subjects as suffrage, finance, local government, corporations and amendments.

The book is a good deal more than a digest of decisions. The opinions of the judges are freely quoted, sometimes at considerable length. References are also made to convention debates, historical facts, and occasionally to more general books, which throw light on various points. And as a whole it is more readable than most legal treatises of recent date. At the same time, the author confines himself quite closely to the statement of the law as it has been determined by the courts. There is little criticism, and no attempt at originality either in ideas or the correlation of topics. Doubtless this method of treatment is to be expected from the main purpose of the book,—to present a convenient handbook of the actual law of the state. That purpose seems to be creditably accomplished, and the book sets a good example for similar works on other states.

J. A. F.

CENTRALIZATION AND THE LAW; Scientific Legal Education; Lectures delivered by Melville M. Bigelow, Brooks Adams, and others before the Boston University Law School; Introduction by Melville M. Bigelow. Boston: Little, Brown & Co., 1906, pp. xvii, 296.

JUSTICE IN THE MAKING OF THE LAW

During the Peloponnesian War, the Athenians undertook the conquest of Melos. At the outset of the contest, there was a conference between the magistrates of Melos and the Athenian ambassadors. The former, among other arguments, said: "However, we trust that, in point of fortune, we shall by the favor of the gods not be worsted, because we are standing up in a righteous cause against unjust opponents." The latter replied to this point: "As regards then the favor of heaven, we trust that we too shall not fall short of it, since we are not requiring or doing anything beyond the opinion of men, with respect to the gods or their determination with respect to themselves. For of the gods, we hold as a matter of opinion, and of men we know as a certainty, that in obedience to an irresistible instinct, they always maintain dominion wherever they are the stronger. And we neither enacted this law nor were the first to carry it out when enacted; but having received it when already in force and being about to leave it after us to be in force forever, we only avail ourselves of it knowing that both you and others, if raised to the same power, would do the same." (Bohn, Translation of Thucydides, Vol. II, p. 371, *et seq.*)

This view of the weakness of justice as compared with strength has often been insisted on. It is found in Napoleon's statement, that God helps the heavy battalions; and, in a declaration of Carlyle, might is right. Recent advocates are found in the lectures of Professors Bigelow and Adams of the Boston Law School, published by Little, Brown & Co., in a volume entitled "Centralization and the Law."

I infer that this is their view, because, in considering the forces of which the law is the resultant, they nowhere mention justice as a factor, but appear to consider only the most material power.

There are an introduction and two lectures, the third and fourth, by Professor Bigelow, and two lectures, the second and third, by Professor Adams. I give a slight sketch of these lectures.

The subject of the introduction is: "The Extension of Legal Education."

The law of the nineteenth century was one of "Equality," that of the twentieth of "Inequality." It is foolish to talk of the principles of the law "as if there was something in the law which is for all time." The legal principles of the time of Marshall, the equitable principles of the time of Kent, were good for that day, but they are now outworn. They are powerless, as every one must see, against the skilful equipment of inequality. There is a constant struggle going on between equality and inequality, and the latter is getting the better. These pages will not take sides in the trial of strength; in the teaching of the law as such, it must always be a matter of indifference which side prevails. The law should always be taught and held to be an order sufficient for maintaining justice under all circumstances. Law is the result of the dominant forces of society,—and justice is not named as one of these forces. Apparently whatever becomes dominant is justice. The attempt is to point out only the dominant material forces, their working and their result. In illustration, there is a brief review of some of the deci-

sions of the Supreme Court of Massachusetts, showing how at one time they have favored capital or inequality, against labor or equality,—according as one force or the other was for the time the stronger.

Perhaps the substance of the teaching of this introduction is that we are now in a great crisis of the fight between equality and inequality; that the old principles of law have become outworn; and that, somehow, the law schools must teach students how to meet the crises; but there is no intimation of what the new teachings should be.

Professor Adams' first lecture is entitled: "Nature of Law: Methods and Aim of Legal Education."

He seeks to show that our law is based too much on a belief in abstract and universal principles of justice. He thinks that such theories worked well enough in the past, but now they are outworn. Now the law is to be conceived as "the resultant of the conflict of forces which arises from the struggle for existence among men." "Instruction in modern law should differ from the instruction which our ancestors received in the law, as does instruction in modern physics from the mediæval instruction in metaphysics." * * * * "I apprehend that the modern instructor in law should follow the method of the modern chemist: he should reject so-called abstract principles and deal with concrete facts. In our time of transition, if we are to understand the phenomena of our law, or lack of law, we must first investigate the social system which gives rise to the law."

To illustrate these views the author makes a brief sketch of certain incidents in the history of law in England and the United States, showing that the law has been in the past, what it is at present, the resultant of the conflict of forces, and that the changes have arisen from the rise of new forces. Still he teaches that the old principles of law are inadequate to meet the new questions.

The title of Professor Adams' second lecture is: "Law Under Inequality: Monopoly."

He treats of the history of law with reference to monopolies in England and the United States, the way in which they have arisen, and the attempts at their overthrow. The general doctrine is that institutions having superior strength maintain their privileges, and the weak lose their property without reference to justice. Even the courts change their decisions when the monopolies before them grow stronger. He says that the changes in the decisions of the Supreme Court of the United States on the power of the state legislatures to fix railroad rates grew out of the increasing investments in railroads and their consequent increase of power. He says on page 132: "With the moral and political aspects of the controversy (that between the people and the capitalists) we as lawyers have nothing to do, for professionally the function of the lawyer is to accept that which exists and deal with exigencies as they arise."

The subject of Professor Bigelow's first lecture is: "Equality and Inequality Defined."

With his definitions I am not concerned. On page 154 he says: "Legal right broadly is what the dominant force in society, deflected more or less by opposition, requires or authorizes."

Professor Bigelow's second lecture treats of "Scientific Method in Law." On page 202 he says: "If, then, the law is to be and to be kept in touch with life as it is, if it is to be the servant of the dominant force in the state, it is plain that those who are responsible for its behavior should themselves be well informed touching life as it is and the affairs of the times." In the conclusion of this lecture, the author discusses complaints of the law and remedies. Whatever may be thought of the wisdom of this part, it must strike every reader as moderate, even tame, in the face of the great crisis which the introduction teaches exists, in which the principles of Marshall and Kent are obsolete.

There is some truth in these lectures. Law is undoubtedly a resultant of forces operating in society, and no doubt the stronger force, or combination of forces, determines the law. But this is equally true of everything else. Everywhere in the natural world and in human society, conflicting forces are at work, and the stronger prevail. The statement is a truism, of no more value in itself than Darwin's doctrine of the survival of the fittest, or the view that our wills always act according to the strongest motive. None of these truisms are of any value, unless followed by a showing of what the forces are which prove the strongest. Nor do vague generalities, like the statement that equality and inequality are always contending, or that monopolies have been fought and resisted, add any thought of value. Of course, ambitious men have always been seeking unlimited power through riches and by control of government, and there will always be such men, and their contests will give rise to great commotions. Such men, and perhaps all men who eagerly seek success in any line, are ever transgressing the highest moral codes of their time. Whether the present is an unusual crisis, it is hard to say; but in the past men have always been exaggerating the relative importance of their time, and we may do the same.

One important truth is presented in these lectures. It is that the lawyers and the law-makers ought to be watching the course of business and making laws with reference to this course. The necessities of business have often been so overpowering as to set the most stringent laws at defiance. The control of the liquor traffic is an instance. The regulation of railroads and of trusts seems likely to give another instance of the powerlessness of law against the force of circumstances surrounding a business. It is of the greatest consequence that legislators and judges should understand the courses of business and seek to make laws whose enforcement is practicable as well as just.

I think that these lectures fail in not recognizing the power of the sense of justice in determining what the law should be. The belief that a law is just or unjust has the greatest influence in its enactment and enforcement. It is a fundamental fact that human beings conceive of conduct as right or wrong as they see beauty in certain objects. If some have no apprehension of right and wrong, so others have no sense of beauty; but men generally have both these capacities. Seldom, if ever, is there a jury argument but that appeals are made by both sides to the notions of justice in the minds of the jurors. In arguments in the courts like appeals are constantly made. And when new

statutes are proposed in our legislatures, they are supported and assailed mainly on the ground that they are right or wrong. In our great political struggles both parties are willing to rest their respective claims to success on the ground that the country will be benefitted thereby. Today no civilized nation goes to war without claiming that its course is just. In considering the forces which enter into the making of any law, perhaps the most important is the idea of justice prevailing in the state. No doubt ideas of justice in a nation are often conflicting and often very vague. Where this is so, material power prevails. And people who have no fixed conviction of justice may find their only certainty in power and assert that this is the basis of right. But where the convictions of the justice of a proposed law are strong and generally prevalent, they constitute a force not likely to be overcome. Even in war, the belief of armies that their cause is just adds much to their material power. The greatest obstacle to the rule of justice lies in the innumerable and conflicting opinions as to what is justice in a given case; but perhaps the conflict is no greater here than about most subjects on which men are called to act. Outside of a very limited field of scientific knowledge, human opinions are infinitely variant and conflicting, and yet such opinions govern society.

I am very far from thinking with these learned professors that a lawyer has nothing to do with the moral aspects of legal controversies. On the contrary, I think that a very important element of lasting success in a practicing lawyer, judge, legislator or politician is that he is in sympathy with the moral feelings of his generation.

I disagree with them in their opinion that the old principles of justice are outworn, that there are no enduring abstract principles of law. They seem to think that abstract principles of law have been developed out of the *a priori* reasoning of the law makers, that they have little relation to the facts of life. The so-called abstract principles of law are mainly rules derived from experience generalized so as to give certainty. Only through them is there any rule by which the decisions of the courts can be predicted. The history of the development of law is given by Sir Henry Maine. It began in the individual decisions of the judge, believed, perhaps, to be inspired. These decisions came to be thought of as based on the feelings of the judge or of his class. At least, they were absolutely uncertain. Then came the invention of codes, abstract principles, drawn perhaps altogether from previous customs, decisions and ideas of justice. Their object was to make the law known and certain, so that men could adapt their business to its requirements. These codes became inadequate. They were enlarged and changed by construction or by new legislation. There is nothing unchangeable in human constitutions. Law, like everything else, is ever varying. Still, I think nothing in human society is more permanent than the most fundamental legal rules.

Darwin says that the more intimately he became acquainted with a certain savage race, the more like they seemed to civilized people. I think that the more profoundly we study ancient legal rules, the more we will see their resemblance to the laws of civilized countries. Surely the ten command-

ments are not outworn. And much of the Roman law survives in modern institutions. Radical and extensive changes in the law are very difficult. No one knows more than a small portion of the law. For a large part lies buried in thousands of volumes, to be brought out only when called for. Changes by the judges as applied to the past may do great wrong. There is no principle of justice more certain than that a case should be determined by the law under which the parties have acted. Changes by the legislatures must be slow if they are to be wise. Legislators generally are ignorant of the existing law. They are incapable of foreseeing the full effect of the statutes they enact. They are subject to the most temporary waves of popular feeling.

But now, as heretofore, the law must be subject to change to meet new developments in society. The changes should be evolutionary and not revolutionary. The old law should be preserved as far as possible. Every new and important statute gives rise to an immense mass of litigation, which interferes with business and is most costly. New statutes should, therefore, be enacted only when the necessity is clear.

The judges must decide according to the statutes in point or the rules laid down in previous cases. It is a libel to say that they are controlled by the power of the forces represented in the litigation before them. How can they find out the dominant force in society until it is embodied in statutes? How can they find any rules for their decisions save in statutes and previous cases?

We may well hope that the fundamental principles of the law will be adequate to the control of the new forces operating in society, and that a sense of justice is as great a factor in moulding the law today as it has been in the past.

C. A. KENT.

THE AMERICAN STATE REPORTS. Containing cases of general value and authority, etc. Selected, reported and annotated by A. C. Freeman. Vols. 105, 106, 107, 108, 109, 110, 111 and 112. San Francisco: Bancroft-Whitney Co., 1906, 1907.

Since our last review of this series, the volumes noted above have appeared. The judgment and discrimination of the editor, which have made this series so valuable to the student and practitioner, are in evidence in these later volumes as in the earlier, and the value of the annotations naturally increases with the multiplication of reported cases and the consequent necessity for some intelligent and dependable examination and comparison of the authorities on a given point of law. Of course no such treatment can be perfect from the point of view of all men. The annotator, striving to make an "exhaustive" note, may include cases which seem to be quite foreign to the point in question; on the other hand, he may omit some certain case which seems to him to be irrelevant, but which is exactly what is desired by the lawyer reading the note. Such experiences will come to the mind of nearly every reader who has used annotated cases in preparing a brief, and they are, of course, inevitable as long as different men have different points of